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No. 011487

IN THE SUPREME COURT OF THE UNITED STATES

D. A. MAYLE, Warden, *Petitioner*,
v.
RICHARD N. BROWN, *Respondent.*

EDDIE YLST, Warden, *Petitioner*,
v.
ERNEST BRAY, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
STEPHANIE A. MIYOSHI
Deputy Attorney General
BRIAN R. MEANS
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5254
Fax: (916) 324-2960
Counsel for Petitioners

4301

QUESTIONS PRESENTED

1. Whether the California courts' determinations, that the Eighth Amendment permits punishment of felonious petty theft by a term of 25 years to life when the defendant has a violent criminal history, was "contrary to" or an "unreasonable application of" clearly established United States Supreme Court precedent?

2. Whether a state court adjudication is "contrary to" Supreme Court precedent when it cites to and discusses controlling United States Supreme Court authority, but does not explicitly discuss every factor stated in the controlling precedent?

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OPINIONS BELOW

The opinion of the court of appeals is not yet published, but can be found at 2002 WL 187415 (9th Cir. Feb. 7, 2002). A copy of the opinion is submitted as Appendix A. The district court's order in *Brown* is submitted as Appendix B, and the magistrate judge's findings and recommendations in *Brown* is submitted as Appendix C. The district court's order in *Bray* is submitted as Appendix D, and the magistrate judge's findings and recommendations in *Bray* is submitted as Appendix E.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed February 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.
Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2254, et seq.
California Penal Code §§ 666, 667, 1170.12 (App. O.)

STATEMENT OF THE CASE

A. California's Recidivist Statutes

California's Three Strikes law consists of a pair of substantively identical statutes both enacted in 1994, one by the California Legislature, Stats. 1994, ch. 12, § 1, and one by ballot initiative, Proposition 184 § 1, as approved by the voters, Gen. Elec. (Nov. 8, 1994). The purpose of the law is to impose longer terms of imprisonment on defendants with prior qualifying felony convictions or "strikes." *See generally In re Cervera*, 16 P.3d 176 (Cal. 2001). Under the law, only "serious" or "violent" felonies, as defined in the Penal Code, qualify as prior strikes. The principal or "triggering" offense, however, may be any felony under California law. When a defendant with two strikes is convicted of any felony, the Three Strikes law authorizes a sentence of 25 years to life. Cal. Penal Code §§ 667(e)(2)(A)(ii); 1170.12(c)(2)(A)(ii).

So-called "wobbler" offenses – offenses that can be either a misdemeanor or a felony, *see People v. Terry*, 54 Cal.Rptr.2d 769 (Cal. Dist. Ct. App. 1996) – may constitute a triggering offense. One such "wobbler" offense is petty theft with a prior theft conviction and imprisonment on that prior. This offense is punishable either as a misdemeanor by imprisonment in the county jail not exceeding one year, or as a felony punishable by a term in state prison. (Cal. Penal Code § 666.) Prosecutors have discretion to charge petty theft with a prior as either a misdemeanor or a felony, and the trial court has reviewable discretion to reduce the felony charge to a misdemeanor at the time of sentencing. *People v. Superior Court* (*Alvarez*), 928 P.2d 1171 (Cal. 1997). Trial courts also have reviewable discretion to strike prior serious or violent felony convictions. *People v. Superior Court* (*Romero*), 917 P.2d 628 (Cal. 1996).

B. *Brown v. Mayle*

Defendant Brown has an extensive criminal history that includes three juvenile offenses (all involving violence), six felony convictions (three involving violence), and 17 misdemeanor convictions (two involving violence). His most recent criminal conduct prompted this case.

On August 7, 1995, Brown attempted to steal a car anti-theft device from a Walgreens store in Stockton, California. As he exited the store, a security alarm sounded. Two uniformed security officers standing outside the store asked Brown to go back through the door to determine whether he "triggered" the alarm. Brown refused. Brown was then told that if he returned whatever merchandise he had taken, he could leave. Brown reached into his jacket and removed the stolen property. But as he was handing over the merchandise, Brown raised his hands and lunged toward the security officers as if he was going to push them. Brown's arms locked with the arms of one of the security officers, and a struggled ensued. Even after Brown was forced to the ground, he continued to struggle with the officers. (App. F [RT 117, 157-159, 168-169].)

A jury convicted Brown of petty theft with a prior theft conviction in violation of Penal Code section 666, a felony. The court found true the allegations that Brown had been convicted of two prior violent or serious felonies, both involving the use of violence. His first strike offense was for robbery. Significantly, Brown used a knife during the commission of the robbery and injured one of his victims. The second strike offense was for assault with a deadly weapon (a .22 caliber handgun) against his female victim. (CT 160, 188, 192, 194, 195.) The court also found true the allegation that Brown committed the offense while on bail or his own recognizance. (Cal. Penal Code § 12022.1) Brown was sentenced to 25 years to life pursuant to California's Three Strikes law.

On direct appeal, Brown argued that his sentence was disproportionate to his offense and therefore in violation of the federal and state constitutional prohibitions against cruel and unusual punishment. The California Court of Appeal affirmed. After reviewing in detail Brown's lengthy criminal history and crimes of violence, the court stated: "[D]efendant is a chronic thief and assailant whose behavior is an easy and appropriate fit within the habitual offender law. . . [¶] With respect to the federal Constitution, we simply note if a sentence of life without possibility of parole for a single offense of possessing more than 650 grams of cocaine is not disproportionate under the United States Constitution (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [115 L.Ed.2d 836, 874]), a fortiori a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.) Brown filed a petition for review with the California Supreme Court, which was denied. (App. H.) Brown later filed habeas petitions with the state superior court, Court of Appeal, and Supreme Court; the petitions were denied. (App. I, J, K.)

Brown then filed a petition for writ of habeas corpus in the federal district court. He alleged that his 25-years-to-life sentence amounted to cruel and unusual punishment. In accordance with the magistrate judge's recommendation, the district court denied habeas relief. (App. B, C.)

C. *Bray v. Ylst*

Defendant Ernest Bray has an extensive criminal history that includes four felony convictions (each a crime of violence), and four misdemeanor convictions. On March 28, 1994, Bray attempted to steal three videotapes from a Wherehouse records store in Long Beach, California.

A jury convicted Bray of petty theft with a prior theft conviction in violation of Penal Code section 666, a felony. The jury also found true the allegations that Bray had previously been convicted of four robberies, which were serious or violent

felonies. One of the robberies involved the use of a weapon by a co-defendant; in one of the other robberies, the victim was kicked and beaten. (CT 100-101, 134-135.) Pursuant to California's Three Strikes law, the court sentenced Bray to state prison for 25 years to life.

On direct appeal, Bray too argued that his sentence amounted to cruel and unusual punishment. The California Court of Appeal affirmed, and the California Supreme Court denied Bray's petition for review. (App. L, M.) Bray later filed a petition for writ of habeas corpus in the state superior court; the petition was denied. (App. N.)

Bray then filed a petition for writ of habeas corpus in the federal district court. He argued that his 25-years-to-life sentence constituted cruel and unusual punishment. The magistrate judge recommended that the petition be denied, and the district court adopted the recommendation. (App. D, E.)

D. The Ninth Circuit's Ruling In *Brown* and *Bray*

The Ninth Circuit's decision in this case followed, and expanded upon, its November 2, 2001 opinion in *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), *petition for cert. filed* (Feb. 1, 2002) (No. 01-1127). In *Andrade,* the court held that the Eighth Amendment prohibited punishing defendant Andrade by a sentence of 50 years to life for his two current convictions for petty theft with a prior, where his criminal history consisted solely of non-violent offenses.[1]

The court found an inference of gross disproportionality, concluding that Brown's and Bray's cases are materially indistinguishable from *Andrade*. The court restated *Andrade's* reasoning that the 50-years-to-life sentence Andrade received was a much harsher penalty than the sentence

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1. After consolidating Brown's and Bray's cases, Professor Erwin Chemerinsky, who represents defendant Andrade, was appointed to represent Brown and Bray.

in *Rummel v. Estelle*, 445 U.S. 263 (1980), because Rummel would have been eligible for parole in 12 years or less. The *Andrade* court analogized the penalty to the sentence of life without possibility of parole in *Solem v. Helm*, 463 U.S. 277 (1983). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Andrade* stated that since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," using petty theft with a prior theft conviction to serve as the third strike creates a "unique quirk," allowing a defendant's recidivism to be "double counted." Finally, the *Andrade* court noted that "[w]hile the Supreme Court frequently defers to legislative judgments regarding the proper length of imprisonment for felony offenses, it is less clear that the same degree of deference is appropriate when extreme sentences are imposed for misdemeanor conduct." *Andrade*, 270 F.3d at 760.

The court in this case extended the reasoning of *Andrade* to rule that Brown's and Bray's sentences were unconstitutional. The court found there was no material difference between Andrade's 50-years-to-life sentence, and Brown's and Bray's 25-years-to-life sentences. The court's reasoning was two-fold: first, Andrade's sentence was based on two petty theft convictions, whereas Brown's and Bray's were based on one; and second, Brown and Bray were "sentenced to indeterminate life sentences and *could* serve as long for their petty theft convictions as Andrade will for his two." The court also found it insignificant that both Brown and Bray have extensive criminal histories that include crimes of violence, stating that "the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is non-violent."

The court analyzed Brown's and Bray's cases from an intrajurisdictional and interjurisdictional perspective, and

determined they were materially indistinguishable from *Andrade*.

The court concluded that a 25-years-to-life sentence for a defendant convicted of petty theft, with a prior theft conviction, is cruel and unusual punishment, regardless of whether the defendant has an extensive criminal history that includes repeated crimes of violence and other offenses that have harsh potentialities for violence. The court also held that the state courts' rulings upholding the sentences were "contrary to" and "unreasonable application[s] of" clearly established United States Supreme Court precedent within the meaning of section 2254(d)(1).

REASONS FOR GRANTING THE PETITION

California, through both legislation and ballot initiative, chose to punish felonious petty theft with a term of 25 years to life where the offender has two prior serious or violent felony convictions. The Ninth Circuit struck down that punishment, finding the Eighth Amendment precludes California from deciding that a current felonious petty theft marks the point at which these recidivists should be deemed to have demonstrated the necessary criminal propensities warranting their extended isolation from society. The decision conflicts with Supreme Court authority, and largely unanimous lower court authority, recognizing such a determination to be the province of the state.

The Ninth Circuit also interpreted and applied the terms "unreasonable" and "contrary to" in the AEDPA in a manner that essentially negates any deference to state court adjudications. In ruling that the decisions of the California Court of Appeals were "unreasonable," the Ninth Circuit ignored the uncertainties that presently exist concerning proportionality, use of priors in a recidivist scheme, and so-called "double counting" of prior offenses, and it disregarded

similarities between this case and *Rummel v. Estelle*, 445 U.S. 263 (1980). Its exceedingly broad interpretation of the term "contrary to" in 28 U.S.C. § 2254(d)(1) conflicts with the language of the statute, the decisions of nine federal circuit courts of appeals, and habeas principles established by this Court.

I.

THE NINTH CIRCUIT'S RULING PARTIALLY INVALIDATING CALIFORNIA'S THREE STRIKES LAW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE APPELLATE COURTS, AND IGNORES THE DEFERENCE CONGRESS HAS AFFORDED STATE COURT DECISIONS.

This Court has identified some common principles that give content to the uses and limits of proportionality review. "[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). Thus, "reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Harmelin*, 501 U.S. at 1016 (quotations omitted). "[O]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289 (1983) (quoting *Rummel*, 445 U.S. at 272).

In *Rummel*, this Court held that a sentence of life imprisonment with an opportunity for parole after twelve years did not constitute cruel and unusual punishment where the defendant, convicted of obtaining $120.75 by false pretenses, had prior felony convictions for passing a no-account check and passing a forged check. In so holding, the Court emphasized that recidivist statutes punish not only the offense of conviction, but also the "propensities" of the defendant demonstrated by his

prior convictions for other crimes. *Rummel*, 445 U.S. at 283-285. The Court explained that "[t]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Rummel*, 445 U.S. at 285.

In *Solem*, the Court held that a sentence of life imprisonment without possibility of parole, imposed against a defendant convicted of uttering a worthless check in the amount of $100 and enhanced pursuant to a South Dakota recidivist statute, violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Solem*, 463 U.S. at 296-97. In reaching its decision, the Court enumerated several criteria to be considered in determining whether a sentence is unconstitutionally disproportionate to the offense: (1) the gravity of the offense relative to the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same offense in other jurisdictions. *Id.* at 292-94. The Court twice stated that its decision was consistent with *Rummel* and thus did not overrule it. *Solem*, 463 U.S. at 228 n.13, 303 n.32.

In *Harmelin*, this Court upheld a sentence of life imprisonment without possibility of parole against a defendant convicted of possessing 672 grams of cocaine. However, no majority opinion emerged on the question of proportionality. Justice Scalia's two-Justice (with Chief Justice Rehnquist) plurality concluded that there was no proportionality review under the Eighth Amendment except with respect to death sentences. Justice Kennedy's three-Justice concurrence (with Justices O' Connor and Souter) concluded that the Eighth Amendment contains a narrow proportionality principle, which was not confined to death penalty cases. Under this approach, the Eighth Amendment forbids only extreme sentences that are "grossly disproportionate" to the crime, and "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare

case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005.

A. The Ninth Circuit Disregarded The Limited Scope Of Habeas Corpus Review When It Held That The State Court Rulings Were "Contrary To" And "Unreasonable Applications Of" Clearly Established Supreme Court Precedent

The Ninth Circuit held that this Court's "clearly-established" Eighth Amendment precedent establishes that a sentence of 25 years to life may not be imposed against a petty thief, no matter how extensive or violent the thief's criminal history. Further, the Ninth Circuit held that it is "unreasonable" and "contrary to" this Court's directives for a California court to conclude otherwise.[2/] To the contrary, whether considered in isolation or together, none of this Court's authorities "clearly establishes" that the Eighth Amendment prohibits *any* particular sentence, less than life without any possible parole, to punish a recidivist for any particular current offense. By holding otherwise, the Ninth Circuit has frustrated Congress's effort to limit the role of federal courts engaging in habeas review. This Court's opinions do not suggest that the state courts' decisions were erroneous, let alone unreasonable; and the uncertainty in

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2. The Ninth Circuit adopted the doctrine of "clear error" as the precedential source for determining whether an erroneous application of federal law was unreasonable. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153 (9th Cir. 2000). The correctness of this definition has been challenged by other federal courts. *Bell v. Jarvis*, 236 F.3d 149, 162 n.9 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001); *Francis S. v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000); *see also Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997).

this area of the law makes it particularly inappropriate for the Ninth Circuit to have rejected the state courts' decisions as unreasonably applying "clearly established" law.

1. This Court has found it to be the normative province of a legislature, rather than the legal determination of a court interpreting the United States Constitution, to determine what punishment may be imposed for a specified offense. Thus, a legislature may punish by life imprisonment without parole a defendant who possesses 672 grams of cocaine, without respect to his criminal history. *Harmelin*, 501 U.S. at 957. And a legislature may punish by life imprisonment with possibility of parole after twelve years a defendant whose current offense is obtaining $120.75 by false pretenses, and whose criminal history consists of passing a "no-account" check and passing a forged check. *Rummel*, 445 U.S. at 263. It is only when a defendant was punished by life without possibility of parole for a minor offense and his prior crimes were all relatively minor, nonviolent offenses, that this Court found an Eighth Amendment violation. *Solem*, 463 U.S. at 277, 296-97. The Court has never suggested that a legislature could not punish a defendant's commission of a minor offense by life imprisonment, without necessarily the possibility of parole, if that offense followed the defendant's prior commission of violent crimes. The Court's concern, in fact, has been with the minor, non-violent nature of the prior offenses.

Of the three principal decisions of this Court on the issue, the one whose facts were closest to the present case was *Rummel* -- in which the Court *upheld* the sentence. As noted, in *Rummel*, the Court upheld a sentence of life imprisonment with an opportunity for parole after twelve years where the defendant, convicted of obtaining $120.75 by false pretenses, had prior felony convictions for passing a no-account check and passing a forged check. 445 U.S. at 263. The gravity of Brown's and Bray's present convictions for petty theft are of similar gravity to Rummel's conviction for obtaining $120.75

by false pretenses. Further, as was the case in *Rummel*, prosecutors in California have discretion to screen out truly petty offenders.[3/] Cal. Penal. Code §§ 667(f)(2); 1170.12(d)(2).

Indeed, this case provides even less grounds for constitutional objection than *Rummel*. Whereas Rummel's two prior convictions were for relatively minor, non-violent offenses, both Brown and Bray have extensive criminal records that include numerous crimes of violence. The California Court of Appeal labeled Brown "a chronic thief and assailant. . . ." (App. G.) Even some of Brown's non-violent criminal convictions -- burglary and driving under the influence of alcohol -- "had harsh potentialities for violence." *Solem*, 463 U.S. at 316 (Burger, J., dissenting, joined by Justices White, Rehnquist, and O' Connor). Moreover, Brown resorted to violence during the commission of the triggering offense; Rummel did not. *Solem*, 463 U.S. at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence").

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3. Although it is true that Rummel would have been eligible for parole in 12 years, whereas Brown and Bray must serve 25 years before becoming eligible for parole, that distinction is not significant. First of all, Rummel received a life sentence. The fact that he became *eligible* for parole in 12 years is not the equivalent of a 12 year sentence. *Rummel*, 445 U.S. at 280 (life sentence with possibility of parole in 12 years is not the "equivalent of a sentence of 12 years.") Moreover, as this Court noted in *Solem*, while "[i]t is clear that a 25-year sentence generally is more severe than a 15-year sentence, [ ] in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." 463 U.S. at 294. And in any event, this single factor should not be dispositive on the Eighth Amendment question. *Solem*, 463 U.S. at 290 n.17

2. Uncertainty pervades this Court's jurisprudence regarding when a criminal sentence violates the Eighth Amendment on the ground that it is disproportionate to the offense. First, there is obvious uncertainty concerning the precise method by which a reviewing court should approach proportionality challenges in non-capital cases. *Compare Solem*, 463 U.S. at 277, *with Rummel*, 445 U.S. at 263. As Justice Kennedy recognized in *Harmelin*, 501 U.S. at 996, 998, Supreme Court "proportionality decisions have not been clear or consistent in all respects," and although the "decisions recognize a proportionality principle, its precise contours are unclear." Justice Kennedy also noted that while the type of punishment imposed is a prominent objective factor, "our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years." *Id.* at 1001.

State and federal courts have found *Harmelin* casts doubt on proportionality review, even questioning whether *Solem's* proportionality test is still relevant in noncapital cases.[4/]

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4. *See also Henry v. Page*, 223 F.3d 477, 482 (7th Cir. 2000) (noting the "apparent confusion" over "whether *Solem* survives" *Harmelin*), *cert. denied*, 532 U.S. 959 (2001); *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997) (noting that *Harmelin* "casts doubt on the exact method by which a reviewing court should approach [proportionality] challenges in non-capital cases."); *United States v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997) ("It is evident [ ] that the contours of the proportionality principle are less than pellucid."); *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) ("It may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem's* three-part proportionality test is still relevant in noncapital cases."); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) ("[T]he holding of *Solem* has been put into doubt by *Harmelin v. Michigan*."); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509 (10th Cir.1993) ("*Harmelin* provides

Some federal courts of appeals, finding Justice Kennedy's concurring opinion to be controlling, have held that the Eighth Amendment guarantees some degree of sentencing proportionality. *See, e.g., United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir.), *cert. denied*, 531 U.S. 1000 (2000); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir.), *cert. denied*, 531 U.S. 882 (2000); *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992). Others continue to follow the full *Solem* test on the theory that "a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*." *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995); *see also Henry v. Page*, 223 F.3d 477, 481-82 (7th Cir. 2000), *cert. denied*, 532 U.S. 959 (2001). This spilt among the circuits has been noted by federal and state courts alike. *See, e.g., Hawkins v. Hargett*, 200 F.3d 1279, 1282 & n.1

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no guidance in articulating the proper approach for an Eighth Amendment analysis."); *United States v. Johnson*, 944 F.2d 396, 408 (8th Cir. 1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear."); *Toulson v. Beyer*, 827 F. Supp. 307, 310 (D. N.J. 1993) ("It is presently unclear which, if either, of [the views in *Harmelin*] will ultimately prevail in the higher courts."), *aff'd*, 30 F.3d 1488 (3d Cir. 1994); *see also State v. Cotton*, 769 So.2d 345, 354 (Fla. 2000) ("the precise contours of the proportionality analysis are unclear"); *State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992) ("the precise contours of the federal proportionality guarantee are unclear"); *Thomas v. State*, 916 S.W.2d 578, 582 (Tex. Crim. Appeal 1996) ("*Harmelin* left the law . . . in a confusing state," and "left much uncertainty in its wake"); *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992) ("It is unclear, in the wake of *Harmelin*, whether . . . *Solem's* analysis survives as a matter of federal constitutional law"); Thomas K. Landry, *"Punishment" And The Eighth Amendment,* 57 Ohio St. L.J. 1607, 1633 (1996) ("The exact test for proportionality is in flux.")

(10th Cir. 1999) (rejecting Fourth Circuit's position that *Harmelin* did not narrow *Solem*); *Wilson v. State*, ___ So.2d ___, 2001 WL 996175, *8 (Ala. Crim. App. 2001) ("Many federal courts of appeal have determined that Justice Kennedy's concurring opinion is controlling, . . . Some federal courts of appeals, however, continue to follow the three-part test announced in *Solem*, as if *Harmelin* did not limit the holding of that case or support a narrower approach to sentencing proportionality.")

Second, this Court has been unclear in specifying the weight prior convictions are given in assessing the constitutionality of a sentence imposed under a recidivist scheme. The Court in *Solem* held that, while the focus is on the felony that triggers the life sentence, the defendant's "prior convictions are relevant to the sentencing decision." *Solem*, 463 U.S. at 296 n.21. The Court, however, did not assign a precise relevance to prior convictions in general, or prior violent crimes in particular. Likewise, although this Court has held that "a State is justified in punishing a recidivist more severely than it punishes a first offender," *Solem*, 463 U.S. at 296, it has emphasized that, in order to avoid double-jeopardy concerns under recidivist sentencing schemes, "the enhanced punishment imposed for the present offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)). This uncertainty prompted Justice Stevens in *Riggs v. California*, 525 U.S. 1114 (1999) (respecting the denial of a petition for writ of certiorari) to note that "[i]t is [] unclear how, if at all, a defendant's criminal record . . . affects the constitutionality of his sentence. . . ." This absence of authority has engendered confusion regarding the treatment of prior convictions in the cruel and unusual punishment determination, as is evinced by the Ninth Circuit's

refusal to give any meaningful weight to Brown's and Bray's extensive criminal histories, which include crimes of violence.

Finally, there is express uncertainty concerning the constitutional significance, if any, of using prior convictions both to elevate an otherwise misdemeanor offense to a felony, and also to calculate the length of incarceration under a recidivist sentencing scheme. In response to a prisoner's argument that this so-called "double counting" is unconstitutional, one court responded: "[T]he 'double counting' argument appears to be an entirely new twist on Eighth Amendment jurisprudence. It has certainly never been addressed by the full Supreme Court, and, as the opinions dissenting from denials of certiorari note, has not been developed in state or lower federal courts either. Under such circumstances, dual use of [a prior conviction] can hardly be said to violate rights that are clearly established by Supreme Court cases." *Smith v. Duncan*, 18 Fed. Appx. 556, 559, 2001 WL 1002858, *2 (9th Cir. Aug. 9, 2001) (unpublished disposition); *see also Riggs*, 525 U.S. at 1114 (noting the uncertainty of "double counting" recidivism on constitutionality of prison term imposed pursuant to California's Three Strikes law).

In ruling that the state courts' adjudications were unreasonable, the Ninth Circuit ignored the uncertainties that exist concerning proportionality, use of priors in a recidivist scheme, and so-called "double counting" of recidivism. The absence of such clear direction from this Court, particularly considered in light of the similarities that exist between this case and *Rummel,* refutes the Ninth Circuit's determination that the decisions of the California Court of Appeals were unreasonable applications of clearly-established Supreme Court precedent. In *Williams v. Taylor*, 529 U.S. 362, 411 (2000), this Court made clear that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established

federal law erroneously or incorrectly." The Ninth Circuit has disregarded that instruction from Congress and this Court.

B. The Ninth Circuit's Ruling Conflicts With California Appellate Authority, A Decision Of The Fifth Circuit, And The Decisions Of Numerous Other State Appellate Courts

Since California enacted its Three Strikes law in 1994, the California courts have uniformly and routinely rejected Eighth Amendment challenges to application of the law to defendants convicted of petty offenses. *See, e.g., People v. Terry*, 54 Cal.Rptr.2d 769 (Cal. Dist. Ct. App. 1996) (25-years-to-life sentence for petty theft with prior theft conviction not cruel and unusual punishment); *People v. Goodwin*, 69 Cal.Rptr.2d 576 (Cal. Dist. Ct. App. 1997) (25-years-to-life sentence for commercial burglary and petty theft with a prior theft-related conviction not cruel and unusual punishment). By refusing to grant review on the issue, the California Supreme Court has ensured affirmance of such sentences on direct appeal. The Ninth Circuit's ruling has therefore placed state prosecutors in an intolerable predicament – controlling state law permits them to apply the Three Strikes law, but if the defendant files a timely and proper habeas corpus petition with a federal court, the federal court will be obligated to issue the writ.

While every grant of federal habeas relief creates a "conflict" with a state court decision, the conflict here is of a different and more fundamental nature than that created by the typical case. This is not a question of differing views regarding whether, for example, a particular defense counsel rendered ineffective assistance under the facts of the case. At issue is the constitutionality of a regularly-applied statutory provision. This Court's intervention is necessary to resolve the federal-state disagreement over whether the Three Strikes law may be enforced against petty offenders.

The Ninth Circuit's resolution of this case also conflicts with Fifth Circuit authority. In *Smallwood v. Johnson*, 73 F.3d 1343, 1345 (5th Cir. 1996), the defendant's current offense of shoplifting property with a value of $27.64 was upgraded from a misdemeanor to a felony because of a prior theft conviction. Under Texas's habitual offender statute, the defendant's prior two felony convictions – for burglary and possession of a controlled substance – led to punishment of the current offense by a prison term of 50 years with parole eligibility in 12 years. *Id.* at 1346. The Fifth Circuit rejected the defendant's contention that his sentence constituted cruel and unusual punishment, finding the case materially indistinguishable from *Rummel*. *Id.* at 1348.

Finally, the Ninth Circuit's ruling conflicts with other state appellate court decisions upholding sentences of 25 years or more based on comparable offenses. *See, e.g., Cantu v. State*, 866 S.W.2d 647, 648-49 (Tex. Ct. App. 1993) (rejecting cruel and unusual punishment challenge to 25 year sentence for shoplifting a pair of shoes); *Smallwood v. State*, 827 S.W.2d 34 (Tex. Ct. App. 1992) (rejecting cruel and unusual punishment challenge to 50-year sentence for shoplifting meat worth less than $30); *Taylor v. State*, 511 N.E.2d 1036, 1038-39 (Ind. 1987) (rejecting cruel and unusual punishment challenge to 32-year sentence for stealing spark plugs worth less than $50); *Hensley v. State*, 497 N.E.2d 1053, 1055 (Ind. 1986) (rejecting cruel and unusual punishment challenge to 32-year sentence for petty theft of gasoline); *Caver v. State*, 466 So.2d 190, 192-93 (Ala. Crim. App. 1985) (rejecting cruel and unusual punishment challenge to 30-year sentence for shoplifting two pairs of pants).

C. The Ninth Circuit's Ruling Will Have An Enormous Adverse Impact On the State Of California And Its Citizens

The Ninth Circuit's decision may result in the early release of an estimated 331 prisoners incarcerated in California state prisons whose last offense of conviction was petty theft with a prior. Each of these 331 prisoners was previously convicted of *at least* two violent or serious felonies. Many, like Brown and Bray, were convicted of numerous *crimes of violence*. Should the Ninth Circuit ruling stand, 331 convicted felons, many with violent criminal pasts, may be set free.[5]

Significantly, the impact of the Ninth Circuit's ruling goes far beyond these 331 prisoners. There are numerous other statutes in California where, like Penal Code section 666, the first violation is a misdemeanor, and any subsequent violation may be prosecuted as a felony.[6] The Ninth Circuit's ruling

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5. A recent study by the San Jose Mercury News found that 95% of the cases in which a 25-years-to-life sentence was imposed in Santa Clara County for a non-violent offense under the Three Strikes law, the prisoners "had previously committed multiple violent acts," and "[t]heir rap sheets contain scores of robberies, rapes, sexual molestations, serial burglaries, assaults and other hard-core criminal behavior." Connie Skipitares, *3 Strikes Sentencing Law Appears To Have Met Its Goal*, San Jose Mercury News, Dec. 28, 2001, at 1A, 18A.

6. *See, e.g.*, Cal. Penal Code § 647.6(c)(1) (annoying or molesting a child); Cal. Penal Code § 12025(b)(1) (carrying a weapon concealed within a vehicle or on a person); Cal. Penal Code § 314 (lewd or obscene conduct); Cal. Penal Code § 289.6(i) (public entity employees engaged in sexual activity with a confined consenting adult); Cal. Penal Code § 311.2(c) (sending or bringing into the state for sale, etc., matter depicting sexual conduct with a minor); Cal. Penal Code § 311.3(d)

directly threatens the constitutionality of three-strikes sentences imposed for the violation of one of these statutes. In fact, in the few weeks since *Brown* was decided, one court has concluded that the sentence of a three-striker whose offense of conviction was felony vehicle theft, a "wobbler," is unconstitutional under compulsion of *Brown*, *Critton v. Hall*, CIV. No. S-99-2491 FCD GGH P (E. D. Cal. Feb. 14, 2002), and another has questioned whether *Brown* mandates granting habeas relief to a defendant convicted of a nonviolent, straight felony, notwithstanding the defendant's extensive and violent criminal history. *Duran v. Castro*, CIV. No. S-00-305 LKK/JFM (E.D. Cal. Feb. 22, 2002) (expressing "some concerns" whether magistrate was right in recommending against granting habeas relief where the defendant was sentenced to 25 years to life for felony possession of heroin, not a wobbler [Cal. Health & Safety Code § 11350(a)], and had an extensive and violent criminal history that includes kidnapping a woman and a child under the age of 14; a robbery in which he stabbed his female victim several times; escaping from jail; being a convicted felon in possession of a firearm; numerous burglaries and receiving stolen property; and forgery.)[7]

(sexual exploitation of a child); Cal. Penal Code §§ 311.4, 311.9(b) (employment of a minor to perform sexual acts); Cal. Penal Code § 311.11(b) (possession or control of matter depicting a minor engaging in sexual conduct); Cal. Penal Code §§ 313.1, 313.4 (distribution or exhibition to minors); Cal. Penal Code § 502.8(c) (advertising, using, or possessing telecommunication devices with the intent to avoid payment); Cal. Penal Code § 12031(a)(2)(A) (carrying a loaded firearm); Cal. Vehicle Code § 23550(a) (driving under the influence); Cal. Penal Code § 594.7 (subsequent conviction for vandalism); Cal. Penal Code § 12304 (sale/possession of fixed ammunition).

7. Professor Erwin Chemerinsky, counsel for respondents both in *Andrade* and this case, has predicted "a

II.

THE NINTH CIRCUIT'S INTERPRETATION OF THE TERM "CONTRARY TO" IN SECTION 2254(d)(1) THWARTS CONGRESS' INTENT TO GIVE DEFERENCE TO STATE COURT ADJUDICATIONS, CONFLICTS WITH THE LANGUAGE OF THE STATUTE AND THE DECISIONS OF OTHER FEDERAL CIRCUITS, AND VIOLATES ESTABLISHED PRINCIPLES OF COMITY.

Section 2254(d)(1) of title 28 defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." This Court has accorded both the "contrary to" and "unreasonable

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flood of new legal challenges," and that "what you'll see by the defense bar is lawyers arguing that other nonviolent crimes used for a life sentence is unconstitutional." David Kravets, *California Court Weakens 3-Strikes Law*, AP Online, Feb. 8, 2002; see also Greg Winter, *California Appellate Ruling Aids Foes of 3-Strike Law*, The New York Times, Dec. 10, 2001, at A14 (57% of the 7,000 felons serving life sentences under California's Three Strikes law were imprisoned for non-violent offenses; public defenders across the state are digging-up old cases to mount a broad challenge to the three-strikes law).

application" clauses independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court's decision can be "contrary to" Supreme Court authority either if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result. *Williams*, 529 U.S. at 405-06. A state court's decision can involve an "unreasonable application" of Supreme Court precedent if it either correctly identifies the governing legal rule but then applies it to a new set of facts in a way that is objectively unreasonable, or extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams*, 529 U.S. at 410-14. This Court in *Williams* clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in 28 U.S.C § 2254(d)(1) refers to holdings, as opposed to dicta, of Supreme Court decisions as of the time of the relevant state-court decision. *Williams*, 529 U.S. at 412.

In response to Brown's constitutional challenge to his sentence, the California Court of Appeal, after reviewing his lengthy criminal history and crimes of violence, stated: "[D]efendant is a chronic thief and assailant whose behavior is an easy and appropriate fit within the habitual offender law. . . [¶] With respect to the federal Constitution, we simply note if a sentence of life without possibility of parole for a single offense of possessing more than 650 grams of cocaine is not disproportionate under the United States Constitution (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [115 L.Ed.2d 836, 874]), a fortiori a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.)

The Ninth Circuit ruled that *Brown* is "properly characterized as [a] 'contrary to' case[] because the state court decision[] [ ] failed to apply some or all of the required Supreme Court analysis" as enunciated in *Rummel*, *Solem*, and *Harmelin*.

Brown, ___ F.3d at ___, 2002 WL 187415, *5; *see also id.* at ___, 2002 WL 187415, *17 ("Brown's habeas petition . . . is properly resolved under the 'contrary to' clause of AEDPA."). By this reasoning, a state court adjudication will be denied AEDPA deference unless the state court *explicitly* discusses every factor relevant to deciding the federal constitutional issue; the citation to and discussion of the leading United States Supreme Court decision -- in this case *Harmelin* -- is insufficient.[8/]

The Ninth Circuit's ruling conflicts with the language of § 2254(d)(1). "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state's process of reasoning." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

The ruling also conflicts with the decisions of the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and

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8. The Ninth Circuit has concluded that when analyzing a habeas claim under the AEDPA standard of review, a federal court must first decide whether the state court's decision was erroneous, prior to considering whether such decision, even if erroneous, involved an unreasonable application of federal law. *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000). This approach was expressly rejected by the Fourth Circuit in *Bell v. Jarvis*, 236 F.3d 149, 161 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001), and is inconsistent with the approach taken by this Court in *Penry v. Johnson*, 532 U.S. 782, ___, 121 S. Ct. 1910, 1919, 150 L. Ed.2d 9 (2001) ("We need not and do not decide whether these differences affect the merits of Perry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedents.")

Eleventh Circuit Courts of Appeals[9/] who have held that state-court adjudications are entitled to deference under 28 U.S.C. § 2254(d)(1) regardless of whether the state court explains its reasoning process. As Judge Posner recognized in *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997), to condition "reasonableness" or "unreasonableness" on the quality of a state court's reasoning, rather than its results "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end." And as the Fifth Circuit explained, "[i]t would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001).

By equating silence with refusal, the Ninth Circuit also violated the principles established by this Court that state courts are presumed to follow the law even when they fail to so indicate, *Walton v. Arizona*, 497 U.S. 639, 653 (1990), and that federal habeas courts should "not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991); *see also Weeks v. Angelone*, 528 U.S. 225 (2000) (applying § 2254(d) review

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9. *See, e.g., DiBenedetto v. Hall*, 272 F.3d 1, 6 (1st Cir. 2001); *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001); *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002).

standards in the face of a summary denial by the Virginia Supreme Court.)

The California Court of Appeal did not apply an incorrect legal standard, nor did it reach a result different than a Supreme Court case involving "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-406. Indeed, the California Court of Appeal specifically cited to and discussed *Harmelin*, this Court's most recent pronouncement on cruel and unusual punishment. The absence of an explicit discussion of every Eighth Amendment principle does not render the adjudication "contrary to" Supreme Court precedent.

III.

SUPREME COURT REVIEW IS NEEDED REGARDLESS OF WHETHER THIS COURT GRANTS THE PETITION FOR CERTIORARI IN *ANDRADE v. ATTORNEY GENERAL*

The State previously filed a petition for writ of certiorari seeking review of the Ninth Circuit's decision in *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001). That case is scheduled to go to conference on March 29, 2002.

Supreme Court review is needed in this case regardless of whether the Court grants the petition for certiorari in *Andrade*. Although the decision in this case subsumes the issues presented in *Andrade* -- the constitutionality of a sentence imposed under the Three Strikes law for an offense of petty theft with a prior -- its expansion of *Andrade's* holding to the present facts provides additional grounds and further justification for Supreme Court review. Andrade's prior convictions were for non-violent offenses. Both Brown and Bray, however, have extensive criminal histories that include numerous crimes of violence. The nature of these prior convictions may be relevant to the ultimate resolution of the Eighth Amendment question. *Solem*, 463 U.S. at 296 n.21 (prior offense relevant to Eighth Amendment question); *id.* at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence."). Also, Andrade received a "sentence of 50 years to life" for his two current convictions for petty theft, considerably longer than Brown's and Bray's 25-years-to-life sentences. The "harshness of the penalty" is a relevant factor to consider in deciding the constitutionality of a sentence. *Solem*, 463 U.S. at 292.

In addition, this case presents an issue of fundamental legal significance not presented in *Andrade*: namely, whether a state court adjudication is "contrary to" Supreme Court

precedent when it cites to and discusses controlling United States Supreme Court authority, but does not explicitly discuss every factor stated in the controlling precedent.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

ARNOLD O. OVEROYE
Senior Assistant Attorney General

STEPHANIE A. MIYOSHI
Deputy Attorney General

BRIAN R. MEANS
Deputy Attorney General
Counsel of Record

Counsel for Petitioners